PUBLIC VERSION

ND-2020-30EC
299767

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina,	)	
Complainant,	)	
v.	)	**Proceeding No.: 20-293** **Bureau ID No.: EB-20-MD-004**
DUKE ENERGY PROGRESS, LLC,	)	
Defendant.	)	

DUKE ENERGY PROGRESS, LLC'S RESPONSE TO AT&T'S INITIAL BRIEF IN ACCORDANCE WITH THE ENFORCEMENT BUREAU'S MARCH 8, 2021 LETTER

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EXECUTIVE SUMMARY

- There are so many factual and legal inaccuracies in AT&T's initial brief that it would be impossible to specifically rebut them all in 15 pages or less. AT&T's initial brief: (1) ignores Commission precedent (without explaining why it believes the precedent is wrong); (2) disputes facts without any contradicting evidence; (3) relies upon strawman arguments; and (4) pretends as if a data set involving tens of thousands of individual data points must be perfect to be informative.

- AT&T claims that it is "disadvantaged" by the joint use agreement ("JUA") as compared to DEP's CATV and CLEC licensees, yet compares its right and obligations under the JUA to the regulatory and statutory rights of CATVs and CLECs. This is the wrong comparative framework under the Commission's existing precedent, and as a matter of logic. DEP has no control over the regulatory and statutory rights of its CATV and CLEC licensees (and it is a moving goalpost, in any event). Moreover, AT&T continues to focus only on what it deems to be burdens and obligations under the JUA, without accounting for the benefits and rights under the JUA.

- Even if there were merit to AT&T's incorrect comparative framework, AT&T has offered absolutely no evidence at all to quantify the net benefits and burdens of the JUA. **This failure of proof is fatal to AT&T's claim for relief for any period governed by the 2011 Order.** This is especially true given that AT&T not only first advised DEP on May 22, 2019 that it took exception with the JUA, but also given that in each year at issue AT&T specifically affirmed the correctness of the annual billing. Even for any periods governed by the 2018 Order, AT&T has failed to offer any evidence to contradict the detailed, quantified net benefits analysis submitted by DEP.

- AT&T also continues to rely upon the Commission's space allocation presumptions without any evidence whatsoever to contradict the evidence submitted by DEP. AT&T claims that it occupies only one-foot of space, even though (a) the previous JUA allocated [redacted] of space to AT&T, (b) the current JUA states that all "existing Attachments to poles used jointly by the parties shall continue to exist in their current condition as of the date of this Agreement," and (c) even though DEP's make-ready survey data reveals that AT&T is actually occupying at least [redacted] of space. AT&T also claims that there are 5 attaching entities per pole, even though DEP's survey of all poles to which AT&T is attached demonstrate that the actual average is well below [redacted]

- Rather than offering its own evidence, AT&T merely takes pot shots at DEP's data. This is remarkable given that AT&T, in essence, has had nearly a decade to plan and prepare for its case against DEP. DEP, on the other hand, had roughly 60-days to respond to AT&T's complaint with its entire case in chief. AT&T either (a) is not serious about its space occupancy positions, or (b) actually developed data in preparation for this proceeding that it knows corroborates DEP's data.

- AT&T's reflex, since it first objected to the JUA cost-sharing methodology in May 2019, has been to reject any evidence or idea that challenged its narrow understanding of the facts and law. This was the reason pre-complaint discussions were fruitless, and it is the reason the parties have made virtually no progress on settlement since that time. AT&T's initial brief is, unfortunately, more of the same. Due to space constraints, this response focuses only on the key points at issue. Any failure to address an allegation raised by AT&T in its initial brief should not be construed as acquiescence. DEF also incorporates by reference its answer and initial brief in this proceeding.

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Pursuant to the Enforcement Bureau's March 8, 2021 letter issued pursuant to 47 C.F.R. § 1.732, Duke Energy Progress, LLC ("DEP") hereby submits this response to AT&T's initial brief.

ARGUMENT

I. AT&T'S ARGUMENT THAT THE JUA "DISADVANTAGES" AT&T VIS-À-VIS DEP'S CATV AND CLEC LICENSEES IS WRONG BOTH FACTUALLY AND LEGALLY.

AT&T focuses solely on its obligations and perceived burdens under the JUA, while failing to account for (or even acknowledge) a single benefit of the JUA. For that reason, AT&T failed to submit a net benefit valuation and thus failed to meet its burden of proof. *This failure of proof is fatal to AT&T's claim with respect to any period governed by the 2011 Order.*[1] Even for any

[1] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 17-84, GN Docket No. 09-51, 26 FCC Rcd 5240, 5331-37 at ¶¶ 214-19 (Apr. 7, 2011) ("2011 Order") (placing burden of proof on ILECs to demonstrate that their joint use rates are unreasonable); *Verizon Florida LLC v. Florida Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50 at ¶ 24 (Feb. 11, 2015) ("*Verizon Florida Order*") (dismissing complaint because ILEC failed to quantify the benefits it receives under the joint use agreement).

periods governed by the 2018 Order,[2] AT&T has failed to offer any evidence to contradict the detailed, quantified net benefits analysis submitted by DEP, which demonstrates that the net per pole benefits to AT&T vastly exceed the "rate" paid by AT&T under the JUA.[3]

A. AT&T's Focus on Its Statutory and Regulatory Status, rather than the JUA

AT&T's following statement reveals a major flaw in AT&T's argument: "As compared to the contractual, **statutory**, and **regulatory** rights enjoyed by AT&T's competitors, the JUA disadvantages AT&T...."[4] AT&T argues it is disadvantaged vis-à-vis CATVs/CLECs because: (1) AT&T lacks a statutory mandatory access right to DEP poles; (2) the Commission's regulations establishing make-ready timelines, one-touch make-ready ("OTMR"), and self-help remedies are inapplicable to AT&T; (3) AT&T is not guaranteed the new telecom rate by statute or regulation.[5]

DEP cannot control the statutory and regulatory status of AT&T or of DEP's CATV/CLEC licensees. Whatever advantages or disadvantages may inure to AT&T or DEP's CATV/CLEC licensees via statute or regulation are of no consequence to the analysis of their relative rights and obligations under the contracts. The proper comparative framework is contract-to-contract, as explicitly acknowledged in the recent *Verizon Maryland Order*.[6] There, the Commission determined that the ILEC's right to remain attached to existing joint use poles following

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[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7770-71 at ¶¶ 128 (Aug. 3, 2018) ("2018 Order") ("Utilities can rebut the presumption we adopt today...by demonstrating that the [ILEC] receives net benefits that materially advantage the [ILEC] over other telecommunications attachers.").

[3] *See, e.g.*, DEP's Answer, Ex. E at DEP000324-401 (Metcalfe Decl.); *id.* at Ex. A, DEP000249-57 (Freeburn Decl. ¶¶ 10-26); *id.* at Ex. B, DEP000286 (Hatcher Decl. ¶11).

[4] AT&T's Initial Br. at 1 (emphasis added).

[5] *See id.* at pp. 3, 5-6, 11-12.

[6] *Verizon Maryland LLC v. Potomac Edison Co.*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13615 at ¶ 20 (Nov. 23, 2020) ("*Verizon Maryland Order*").

termination of the joint use agreement provided it with a "material advantage[] over [CLEC] and [CATV] attachers on the same poles."[7] The Commission contrasted this right under the joint use agreement to the electric utility's pole license agreements, which required the electric utility's CATV and CLEC licensees "to remove all attachments prior to any specified termination date."[8]

B. AT&T Access to DEP Poles under the JUA

AT&T argues that the JUA allows DEP to deny AT&T access to any pole DEP deems unsuitable for joint use and to terminate AT&T's ability to deploy facilities on future DEP pole lines.[9] However, the very first page of the JUA states: "CP&L and BellSouth desire to continue Joint Use of poles **and in the future to establish further Joint Use of their respective poles** when and where Joint Use shall be of mutual advantage."[10] AT&T cannot credibly contend that the implementation of the JUA has been anything but pro-access, as it has facilitated the ubiquitous deployment of AT&T's facilities throughout the parties' overlapping service areas.[11]

AT&T also argues that it is disadvantaged because, unlike the JUA, DEP's pole license agreements with CATVs/CLECs require DEP to replace existing poles with taller poles to accommodate licensees.[12] To the contrary, *none* of DEP's license agreements require DEP to

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[7] *Id.*

[8] *See id.; see also Verizon Fla. LLC v. Fla. Power and Light Co.*, Mem. Op. and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1148-49, 1150-51 at ¶¶ 21, 24 (Feb. 11, 2015) ("*Verizon Florida Order*") (comparing "unique benefits" ILEC enjoyed under joint use agreement to rights afforded under electric utility's pole license agreements); *accord BellSouth Telecomm., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Mem. Op. and Order, Pro. No. 19-187, 35 FCC Rcd 5321, 5328-29 at ¶ 14 (May 20, 2020).

[9] *See* AT&T's Initial Br. at 3.

[10] DEP's Answer, Ex. 1 at DEP000119 (JUA, Recitals); *see also id.* at DEP000121 (stating that "each party hereby permits Joint Use by the other party of any of its poles" if "the requirements of the Code are met" and "so long as such use does not unreasonably interfere with the use being made by the other party").

[11] *See, e.g.,* DEP's Answer at ¶ 30.

[12] *See* AT&T's Initial Br. at 4.

expand capacity for a CATV/CLEC licensee.[13] Moreover, the specific license agreement quoted by AT&T explicitly reserves DEP's right to deny attachment requests for any lawful reason.[14] In contrast, DEP is obligated under the JUA to expand capacity at AT&T's request and at a much lower cost to AT&T than DEP's CATV and CLEC licensees would incur.[15]

C. AT&T's Alleged Pole Ownership and Maintenance Obligations

AT&T complains that under the JUA it must own and maintain joint use poles, unlike DEP's CATV and CLEC licensees.[16] It is obvious, though, that nothing in the JUA requires AT&T to own or maintain poles because AT&T owns 17% of the jointly used poles, and the poles that AT&T does own are insufficiently maintained.[17] AT&T argues that it has invested $139 million in its pole network in North and South Carolina and expended in excess of $10 million dollars each year of this dispute to own and maintain poles there.[18] AT&T's foregoing figures only confirm what DEP already knew—that DEP is shouldering the *vast* majority of the cost of the parties' joint use pole network. DEP, as of 2020, had invested $855,785,431 in its poles in North Carolina and South Carolina.[19] Further, DEP incurred pole maintenance expenses of ~$96 million in 2017, ~78 million in 2018, and ~$122 million in 2019.[20]

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[13] *See generally* DEP's Suppl. Interrog. Resp., Ex. 2 at DEP000409-1361 (DEP's Pole License Agreements).
[14] *See* CATV-1 at DEP000009-10 (Section 2.1).
[15] *See* DEP's Answer at ¶ 17; *id.* at Ex. 1, DEP000122 (JUA, Articles VII.A., VII.F.4); *id.* at Ex. 5, DEP000178 (Exhibit B Cost Schedule); *id.* at Ex. A, DEP000255-57 (Freeburn Decl. ¶¶ 23-25).
[16] *See* AT&T's Initial Br. at 4-5. In making this argument, however, AT&T cites to its joint use agreement with Duke Energy Florida—not the JUA at issue in these proceedings. *See id.* at n.17.
[17] *See* DEP's Answer at ¶ 14; AT&T's Compl. at ¶ 3.
[18] AT&T's Initial Br. at 5.
[19] DEP's Answer, Ex. D at DEP000315 (Harrington Decl. Ex. D-3).
[20] *Id.*

D. AT&T's Alleged Lack of OTMR and Self-Help Remedies

AT&T complains that it is "disadvantaged" because the Commission's self-help and OTMR rules for CLECs/CATVs do not apply to AT&T.[21] As aforementioned, it is AT&T's *contractual* rights, and not its statutory or regulatory rights, that are relevant. AT&T's rights under the JUA are even *more* advantageous than the self-help and OTMR remedies afforded to CATVs/CLECs by regulation. The JUA provides that "[i]n the event that Owner of the pole cannot perform the necessary work [i.e., pole replacement] in time to meet the Licensee's service commitments to its customers, Licensee may perform the work..."[22] AT&T also pays for make-ready pole replacements at the JUA's scheduled (a/k/a "tabulated") costs, rather than the actual costs that CATVs/CLECs pay for make-ready.[23] This results in significant savings to AT&T.

E. AT&T's Guaranteed Lowest Position in the Communications Space

AT&T focuses on the limited costs and risks of its guaranteed lowest position in the communications space, while failing to even acknowledge the advantages of that position.[24] AT&T has never sought to abandon its right to the lowest position in the communications space.[25]

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[21] AT&T Initial Br. at 5-6.

[22] *See* DEP's Answer, Ex. 1 at DEP000124 (JUA, Article VII.F.8).

[23] *See* DEP's Answer at ¶ 17; *id.* at Ex. A, DEP000255-57 (Freeburn Decl. ¶¶ 23-25); *id.* at Ex. 1, DEP000123, DEP000124 (Joint Use Agreement, Articles VII.F.4., VII.F.6.b.); *id.* at Ex. 5, DEP000178 (Exhibit B Cost Schedule, Table I); *see, e.g.,* CATV-4 at DEP000597-98, DEP000610 (Article 11, Definitions App'x); CLEC-6 at DEP000651-52 (Section 3.6); WIRELESS-7 at DEP001300, DEP001305 (Sections 1.16, 5.3).

[24] *See* AT&T's Initial Br. at 6-8; *see* DEP's Answer, Ex. 1 at DEP000121 (JUA, Article III.A.) ("[DEP's] use of space below [AT&T] shall be limited to vertical Attachments unless agreed to by the field representatives..."); *id.* at DEP000130 (JUA, Article XV.D) (precluding DEP from granting third parties rights that DEP does not itself have under the JUA).

[25] *See* DEP's Answer at ¶ 19; *id.* at Ex. A, DEP000253-54 (Freeburn Decl. ¶19); *id.* at Ex. 2, DEP000140 (1977 JUA, Article I.A.2.); *id.* at Ex. 1, DEP000121 (JUA, Article III). AT&T's argument that it has attempted to do so via the position taken by its affiliate in the CTIA proceeding is simply false. *See* AT&T's Initial Br. at 8 & n.32. As explained in DEP's answer, AT&T's affiliate argued that it should be permitted to make wireless attachments in the unusable space on the pole. *See* DEP's Answer at ¶ 18.

F. AT&T's Actual Occupation of More than [redacted] Feet of Space

AT&T claims: "For the last 25 years, the 1977 JUA's space allocations were unlawful, unenforceable, and unobserved."[26] However, AT&T relies on precedent that prohibit *ILECs* from reserving space *on their own poles*; the very same precedent upon which AT&T relies explicitly allows *electric utilities* to reserve space *on their own poles*.[27] AT&T's argument that the 1977 JUA's space allocation is unlawful and unobserved is undermined by at least four facts. First, AT&T *agreed to* the [redacted] foot space allocation in Article III.B by executing the 1977 JUA.[28] Second, AT&T *agreed to continue* that space allocation to the current day by executing the 2000 JUA.[29] Third, AT&T *actually occupies* at least [redacted] per DEP pole on average—well in excess of the [redacted] feet reserved under the 1977 JUA.[30] Fourth, AT&T never raised an objection to its space allocation until these proceedings. Regardless, since the beginning, DEP has constructed its pole network to accommodate AT&T's historical space allocation (and the required safety space).

G. The JUA's Perpetual License Provision

AT&T argues that the JUA's perpetual license provision (which it incorrectly calls as an "evergreen" provision)[31] disadvantages AT&T by locking in the JUA's annual rental rates even

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[26] AT&T's Initial Br. at 9.

[27] *See id.* at 9 n. 39; *see also* DEP's Answer at ¶ 25 & n.96.

[28] *See* DEP's Answer, Ex. 2 at DEP000140 (1977 JUA, Article I.A.2).

[29] *See* DEP's Answer, Ex. 1 at DEP000121 (JUA, Article III.B.) (stating the "parties agree that all existing Attachments...shall continue to exist in their current condition as of the date of this Agreement."); *id.* (JUA, Article III.A.) (allowing AT&T to occupy as much space as it desires so long as such use complies "with the requirements of the Code" and "does not unreasonably interfere" with DEP's use of the jointly used poles).

[30] *See* DEP's Suppl. Interrog. Resp., Ex. 4 at DEP001381 (Survey Results); *id.* at Ex. A, DEP000248, DEP000250, DEP000253-54 (Freeburn Decl. ¶¶ 9, 13, 19); *id.* at Ex. B, DEP000287 (Hatcher Decl. ¶ 14). DEP's calculation of AT&T's average feet of space occupied has increased to [redacted] from [redacted] for the reasons explained in Section II.A.1.a. *infra*.

[31] *See* DEP's Answer at ¶¶ 15, 21, 27, 38; *id.* at Ex. A, DEP000255 (Freeburn Decl. ¶ 22); *id.* at Ex. B, DEP000288-89 (Hatcher Decl. ¶ 16).

after termination, while CATVs/CLECs are guaranteed the cable rate/new telecom rate.[32] The Commission has previously found that perpetual license provisions materially advantage ILECs over CATVs/CLECs.[33] In addition, DEP has previously provided unrefuted evidence that the net value of the perpetual license provision to AT&T is $[redacted] (or $[redacted] per pole) annually.[34]

II. AT&T's RELIANCE ON THE COMMISSION'S SPACE ALLOCATION PRESUMPTIONS IS AT ODDS WITH SIGNIFICANT RECORD EVIDENCE REBUTTING THOSE PRESUMPTIONS.

Though there are still a few minor points of disagreement between the parties with respect to the proper calculation of DEP's annual pole cost (net cost of a bare pole x annual carrying charge), the main dispute relates to how those costs should be allocated. AT&T has presented no evidence at all on this issue, and instead merely attempts to undermine the evidence presented by DEP regarding: (1) the space AT&T actually occupies on DEP's poles; and (2) the average number of attaching entities on DEP poles occupied by AT&T.[35]

A. AT&T, Without Evidence to Rebut DEP's Evidence, Continues to Argue that It Actually Occupies Only One Foot of Space on DEP's Poles.

1. AT&T's Attack on DEP's Make-Ready Survey Data

DEP presented data demonstrating that, on average, AT&T occupies [redacted] (now

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[32] AT&T Initial Br. at 11 (citing DEP's Answer, Ex. 1 at DEP000130 (JUA, Article XVII.B.)).

[33] *See Verizon Maryland Order*, 35 FCC Rcd at 13615, ¶ 20 (finding provision that allowed ILEC to remain attached to existing joint use poles following termination of joint use agreement was "material advantage" over other attachers, who "are required to remove all attachments prior to any specified termination date").

[34] DEP's Answer, Ex. E at DEP000333-34, DEP000361 (Metcalfe Decl. ¶ 18-21, Ex. E-2).

[35] AT&T's failure of evidence on these issues is remarkable given that it had nearly a decade to pull together its "case in chief" against DEP. If AT&T was so intent on insisting that the Commission's presumptions were correct, it would seem that AT&T might have gathered some evidence on this point—especially knowing that DEP would have evidence given its routine make-ready surveys and cyclical pole audits. AT&T complete lack of evidence speaks volumes: AT&T either (a) did not take its position seriously enough to develop any evidence to support it; or (b) actually developed evidence, but is withholding it because it would corroborate DEP's evidence.

determined to actually be [redacted]) feet of space feet on DEP poles.[36] This data was gathered by DEP's make-ready survey contractor as part of make-ready surveys performed at the request of third-party attaching entities during the 2019-2020 time frame.[37] This data corroborates, and is corroborated by, AT&T's historical space allocation of the lowest [redacted] feet of space within the communications space.[38] AT&T presented no evidence whatsoever to contradict the evidence submitted by DEP or to contradict the legitimacy of the historical space allocations.[39] Instead, AT&T merely attacks DEP's make-ready survey data by arguing: (1) the data presented contains errors; (2) the data is not statistically valid; (3) the data was gathered prior to the performance of any make-ready work; and (4) the data is not geographically representative of the area covered by the JUA. For the reasons set forth below, none of these arguments discredits the overarching point of the data—AT&T is actually occupying space in excess of its historical space allocation and, in any event, far greater than the Commission's one-foot presumption.

a. Alleged Errors in DEP's Make-Ready Survey Data

AT&T is correct that the DEP make-ready survey data does not represent 1,039 unique poles. DEP incorrectly understood the "Unique ID" assigned by TRC as unique to each pole, when in fact it is unique to each measurement on a pole. These unique measurements, for example, capture all of AT&T's attachments on each pole (not just the highest attachment). The

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[36] *See* Section II.A.1.a. *infra*.
[37] *See* DEP's Answer, Ex. A at DEP000250-51 (Freeburn Decl. ¶ 13).
[38] *See supra* notes 28, 29 & 30.
[39] AT&T argues that the only data point the Commission should consider from DEP's make-ready survey is data related to average pole height, which AT&T alleges would drive down the annual rental rate. *See* AT&T's Initial Br. at 15-16. However, pole height does not affect the space occupied by AT&T's attachment(s). AT&T attaches at the same height whether the pole is 40 or 50 feet. And even more importantly, DEP is not attempting to rebut the Commission's 37.5 foot pole height presumption. If AT&T wanted to rebut that presumption, it should have offered evidence on this point.

measurements also duplicate attachment height at the pole for purposes of associating a mid-span clearance with a particular pole (given that mid-span measurements are a function of a "span" which involves two poles). The actual number of unique poles is fewer than 1,039, though AT&T is also correct that only [redacted] of the unique poles have associated Pole Tags and Lat/Long coordinates. Among these [redacted] unique poles, as AT&T has no doubt figured out, AT&T's actual space usage is greater than DEP initially believed. The average height of AT&T's highest attachment on those [redacted] poles is [redacted] feet ([redacted]), rather than the [redacted] ([redacted]) DEP initially believed, meaning AT&T is actually occupying [redacted] feet ([redacted]) of space—not [redacted] feet ([redacted]). Either way, AT&T is vastly exceeding the one-foot presumption on which it relies, without evidence.

b. The Alleged Unreliability of DEP's Make-Ready Survey Data

AT&T also argues that make-ready surveys are an unreliable means of determining AT&T's average attachment height because they precede make-ready, and AT&T "routinely lowers its facilities as part of the make-ready process."[40] But the fact that a make-ready *survey* has been performed does not mean that *make-ready* has been performed; one of the purposes of the survey is to determines whether make-ready is required at all. And the fact that make-ready has been performed does not mean that AT&T has actually moved its attachments. In any event, between 2019-2020, only [redacted] of the 148,065 DEP poles to which AT&T is attached were even the subject of a make-ready survey.

c. The Statistical Significance of DEP's Make-Ready Survey Data

AT&T argues that DEP's make-ready survey data is invalid because it was "collected for an entirely different purpose"—i.e., make-ready surveys of third-party attachments.[41] But the fact

[40] AT&T's Initial Br. at 13.
[41] *Id.*

that this data was collected for purposes wholly unrelated to this case, and that the data points were selected by a disinterested party (third party attachers), validates—rather than undermines—the sample. That is because the key principle of any statistical sampling is that the selection process for generating the data is independent of the variable of interest, as is the case here.

AT&T essentially agues that the only valid data is data from a survey specifically designed to address the variable of interest (e.g., height of AT&T's highest attachment). This would be impossible for DEP to accomplish given the short timeframe within which it was required to answer the complaint.[42] DEP had no choice other than to use data that already existed to verify a point that should not even be credibly in dispute. AT&T, on the other hand, had nearly a decade to plan and gather evidence on this point. Notably, it produced none.

d. The Geographic Scope of DEP's Make-Ready Survey Data

AT&T also challenges the statistical validity of DEP's make-ready survey data by arguing that it "sites [redacted] of the poles in just [redacted] counties covered by the JUA."[43] However, AT&T's own map shows that DEP's make-ready surveys were performed on a geographically dispersed sample of poles.[44] In fact, the [redacted] counties from which DEP's data was gathered are where [redacted] of all AT&T attachments to DEP's poles are located. Furthermore, the total number of counties covered by the JUA ([redacted]) is irrelevant; what matters are the number of counties in which AT&T has attachments on DEP's poles ([redacted]). Further, AT&T is attached to less than [redacted] DEP poles in [redacted] of those [redacted] counties, and less than [redacted] poles in [redacted] of the [redacted] counties. AT&T also complains that

[42] If AT&T has legitimate concerns regarding the accuracy of this data, then DEP is willing to work with AT&T on designing and performing a new survey to ascertain the average height of AT&T's highest attachment on DEP's poles. DEP is confident that any survey will corroborate the findings that are part of the record evidence in this case.
[43] AT&T's Initial Br. at 13.
[44] *See id.* at Ex. 5.

[redacted] of the data set comes from [redacted] counties, but those [redacted] counties ([redacted]) account for approximately [redacted] of all DEP poles to which AT&T is attached.[45]

2. Ground Clearance Method for Determining Actual Space Occupied

AT&T also argues that DEP's methodology for determining AT&T's average space occupied—i.e., subtracting the minimum ground clearance presumed by the Commission (18') from the average height of AT&T's highest attachment on each DEP pole ([redacted]) is legally impermissible.[46] AT&T argues that Commission precedent does not permit DEP to charge AT&T for the space below its attachments if AT&T's "facilities are not attached at the absolutely lowest point possible on the poles."[47] However, as set forth above, some of the poles have multiple AT&T attachments, and many of AT&T's attachments have significant sag which has the effect of displacing other potential wireline attachments.[48] Also, because the JUA allocates AT&T the lowest communications space position, DEP cannot allow other parties to attach below AT&T.[49]

AT&T further argues that DEP should have determined the actual ground clearance for each pole surveyed, rather than relying on the Commission's 18' ground clearance presumption to determine space actually occupied by AT&T.[50] But as the Commission has previously stated:

> [A] presumptive average 18 feet of the pole space is reserved for ground clearance... In the Usable Space Order, we determined that the selection of the 18 foot figure reflected various elements such as differing pole heights, as well as NESC standards that vary depending on the physical environment of the pole. Factors used to determine the NESC standard of minimum ground clearance include whether the wires or cables cross over railroad tracks, roads, or driveways and the amount of voltage transferred through the cables...In the Usable Space

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[45] [redacted].

[46] AT&T's Initial Br. at 18-19.

[47] *Id.* at 18.

[48] *See* Section II.A.1.a. *supra.*

[49] *See* Section I.E. *supra.*

[50] *See* AT&T's Initial Br. at 18-19.

> Order we carefully considered numerous studies submitted to us before concluding that the 18 foot figure was an appropriate tool to estimate usable space.[51]

Here, DEP has not sought to rebut the Commission's 18-foot ground clearance presumption. Neither has AT&T; and AT&T certainly has not submitted any evidence to rebut that presumption.

Finally, AT&T argues that mid-span sag is irrelevant because "under the Commission's rate formula, 'space occupied' means space 'actually occupied' on—*i.e.*, the 'actual physical attachment' to—the poles."[52] However, none of the authority cited by AT&T actually supports its argument.[53] AT&T's characteristic heavily bundled legacy copper sags significantly more than the fiber optic cable used by CATVs/CLECs.[54] AT&T's sag matters because in order to meet code for midspan clearance, AT&T much attach significantly higher than 18 feet at the pole. This has the effect of displacing any use of the space beneath AT&T's facilities, even is such use were contractually permissible. For example, if AT&T's facilities sag three feet at mid-span, a third-party could not attach a through-bolt one foot below AT&T's through-bolt (even if contractually permitted) because it would either: (a) violate midspan ground clearance requirements, or (b) violate mid-span clearance requirements between communications facilities.

B. AT&T's Failure to Address DEP's Safety Space Arguments

AT&T once again ignores the arguments raised in DEP's answer regarding the safety space and, instead, merely trots out the same arguments it raised in its complaint and reply. Rather than

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[51] *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6468-69 at ¶ 23 (Apr. 3, 2000).

[52] AT&T's Initial Br. at 18.

[53] *See id.* at n.86 & n.87 (citing authority that addresses overlashing and the allocation of safety space and space attributable to clearance requirements).

[54] *See* DEP's Answer, Ex. A at DEP000251-52, DEP000263-65 (Freeburn Decl. ¶¶ 14-16, Ex. A-1); *see also* DEP's Suppl. Interrog. Resp., Ex. 4 at DEP001381 (Survey Results). In rebutting DEP's sag data, AT&T only offers two Google street view photos from 2018. *See* AT&T's Initial Br. at 15 n.68 & Ex. 10. This "evidence" is not only clearly inadmissible—it is patently absurd.

repeating its responses to AT&T's arguments here, DEP hereby incorporates its counterarguments on this issue from its answer and initial supplemental brief.[55] In summary, AT&T should bear the cost of the safety space because: (1) but for AT&T's attachments (which were the first to DEP's poles) there would have been no safety space on DEP's poles; [56] (2) the Commission's statement from the *FPL I Order*, upon which AT&T relies, is only correct with respect to AT&T-owned joint use poles; on poles owned by DEP, it is the presence of *communications attachments*—not the presence of *electric lines*—that makes the safety space necessary;[57] (3) DEP does not need and does not use the safety space on its own poles, thus making this case factually distinct from the precedent upon which AT&T relies.[58] AT&T's reliance on the *FPL I Order* is also misplaced because the pre-2011 Order precedent cited in *FPL I* was premised on Commission precedent that assumed that *ILECs and electric utilities already shared the cost of the safety space*.[59]

C. AT&T Does Not Seriously Dispute that [redacted] is the Appropriate Average Number of Attaching Entities.

AT&T raises two half-hearted arguments in opposition to the use of [redacted] as the average number of attaching entities on DEP poles jointly used by AT&T. First, AT&T argues that the average is too specific, in that it only captures poles to which AT&T is attached.[60] However, the Commission just three month ago—in a case involving AT&T—specifically accepted an average

[55] *See* DEP's Answer at ¶ 25; DEP's Initial Br. at pp. 9-10, 21-22.
[56] *See* DEP's Answer at ¶¶ 16, 22, 25; *id.* at Ex. A, DEP000252-53 (Freeburn Decl. ¶¶ 17-18); *id.* at Ex. B, DEP000284, DEP000289-90 (Hatcher Decl. ¶¶ 9, 18); *id.* at Ex. C, DEP000296-97 (Burlison Decl. ¶¶ 7-10); *id.* at Ex. D, DEP000309 (Harrington Decl. ¶ 17); *id.* at Ex. E, DEP000339-40 (Metcalfe Decl. ¶ 33); *see also 2011 Order*, 26 FCC Rcd at 5302, ¶ 144 n.433 (noting that it would be irrational to install taller poles than necessary in anticipation of future third-party attachments).
[57] *See* DEP's Answer at ¶ 25; *id.* at Ex. A, DEP000252 (Freeburn Decl. ¶ 17).
[58] *See* DEP's Answer at ¶ 25; *see also supra* note 56.
[59] *See* DEP's Answer at ¶ 25.
[60] AT&T's Initial Br. at 20-21.

number of attaching entities based exclusively on the electric utility's poles jointly used by AT&T.[61] AT&T does not even mention, let alone address, this authority. Further, in one of the earliest cases addressing the average number of attaching entities, the Commission held:

> "For example, an attacher is only responsible to pay its Telecom Formula share of the costs of unusable space for the poles to which it is actually attached." In order to be a reasonable reflection of the actual poles to which an attacher is affixed, the average must reflect only those poles in areas where the attacher is actually affixed."[62]

The Commission thus encourages a methodology ensuring that an attaching entity is charged based on "the actual poles to which [it] is affixed." This is precisely what the [redacted] average reflects.

Second, AT&T argues:

> [DEP] also lacks accurate and reliable data to support its alleged [redacted] value. It relies on a table with the findings of its contractor, VentureSum, without any of the information needed to assess the reliability or accuracy of those findings absent a full field review of 148,065 poles. Some flaws, however, are apparent without a field review. VentureSum's findings, for example, state that [redacted] poles surveyed have 6 attaching entities, but the data that is supposed to substantiate that report includes nearly 20 times as many poles with 5 attaching entities. VentureSum similarly undercounted the poles with 6 or more attaching entities, stating there is just [redacted] pole when its data shows at least [redacted][63]

DEP did not rely on a "table" for purposes of the [redacted] average attaching entities. DEP relied on an audit of all poles performed by VentureSum, which was summarized in said table. The results of this audit were made available in real time to AT&T and all other attaching entities (with each entity receiving the results regarding its own attachments). The entire Microsoft Access database

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[61] *See BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 2021 FCC LEXIS 124, at *20-21, ¶ 18 (Jan. 14, 2021) ("We find that FPL has rebutted the Commission's presumptions by providing survey results establishing that ... the average number of attachers on its JUA distribution poles is 2.99.").

[62] *Teleport Communications of Atlanta, Inc. v. Georgia Power Co.*, Order on Review, File No. PA 00-005, 17 FCC Rcd 19859, 19869 at ¶ 25 (Oct. 8, 2002).

[63] AT&T's Initial Br. at 21.

containing the results of the audit (all 531 MB of data) were also produced to AT&T in January 2021.[64] Notably, AT&T has not alleged that its own scrutiny of the database indicates a different average number of attaching entities—it merely attempts to undermine the entire data set with cherry-picked alleged "flaws." These may not be "flaws" at all. Without knowing whether or how AT&T actually queried the data, it is impossible to address the alleged "flaws" or explain AT&T's mistake. The DEP database is a hybrid database that not only contains records of attachments found during the inventory, but also contains records (similar to the record of attachments) that are flagged to be "removed" from the previous database. If AT&T pulled a query from the DEP database without understanding the codes that mark each record, their queries would be invalid. Whatever the case, even assuming the additional [redacted] attaching entities alleged by AT&T on the 148,065 poles at issue, would result in <1% variance of the average number of attaching entities.

CONCLUSION

For those reasons set forth above, as well as in DEP's initial brief and answer, the Commission should deny all relief sought by AT&T. AT&T has failed to meet its burden of proof with respect to periods governed by the 2011 Order. With respect to the periods covered by the 2018 Order, AT&T failed to even voice an objection to the cost-sharing methodology in the JUA until May 22, 2019. Further, the rates charged by DEP under the JUA are just, reasonable, and non-discriminatory in light of the significant, quantified, net material benefits AT&T receives under the JUA. If the Commission unwinds the cost-sharing provisions of the JUA at all, any alternative rates that the Commission sets should be consistent with the rates set forth in paragraphs 37 or 38 of DEP's Answer.

[64] *See* DEP's Suppl. Interrog. Resp., Ex. 3 at DEP0001362 (VentureSum Audit Data).

Respectfully submitted this 19th day of April, 2021.

s/ Eric B. Langley
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VERIFICATION

I, Eric B. Langley, as signatory to this submission, hereby verify that I have read Duke Energy Progress, LLC's Response to AT&T's Initial Brief and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded and in fact is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.

s/ Eric B. Langley
Eric B. Langley

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 19, 2021, a true and correct copy of Duke Energy Progress, LLC's Response to AT&T's Initial Brief was filed with the Commission via ECFS and was served on the following (service method indicated):

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